

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FELICIA DIXON,

Plaintiff,

v.

ORDER
08-CV-528S

CURTIS KUBIAK, et al.,

Defendants.

1. Plaintiff Felicia Dixon commenced this action by filing a Complaint in the United States Court for the Southern District of New York against Defendants pursuant to 42 U.S.C. § 1983. On July 18, 2008, the case was transferred to this Court. (Docket No. 55.) And on September 5, 2008, this Court referred the case to the Honorable Jeremiah J. McCarthy, United States Magistrate Judge, for pretrial proceedings. (Docket No. 62.)

2. On January 20, 2009, the Clerk of the Court filed an Entry of Default as to Defendant Curtis Kubiak. (Docket No. 74.) Thereafter, Plaintiff filed a Motion for Default Judgment. (Docket No. 75.) Plaintiff's motion is based upon Defendant Kubiak's failure to respond to the initial complaint.¹

3. In response to the motion, Judge McCarthy filed a Report and Recommendation recommending that Plaintiff's Motion for Default Judgment be denied without prejudice. (Docket No. 82.) Because it was unclear whether Defendant Kubiak was served with – and failed to respond to – one of the four amended complaints, Judge McCarthy held that Plaintiff's motion, which is based upon Defendant Kubiak's failure to

¹ The Complaint has been amended on four (4) separate occasions. (Docket Nos. 43, 46, 61, 68.)

respond to the initial complaint, would be rendered moot in the event that Defendant Kubiak was served with one of the amended complaints. Id. Therefore, Judge McCarthy recommended that Plaintiff's motion be denied unless Plaintiff stated in writing, by March 6, 2009, that none of the four amended complaints were served upon Defendant Kubiak. Id.

4. No objections to the Report and Recommendation were received from either party within ten (10) days from the date of its service, in accordance with 28 U.S.C. § 636(b)(1)(C) and Local Rule 72.3(a)(3).

5. Despite her failure to file objections to the Report and Recommendation, on March 2, 2009, Plaintiff filed a second Motion for Default Judgment as to Defendant Kubiak. (Docket No. 83.) In her supporting memorandum of law, Plaintiff states that Defendant Kubiak "was most recently served with the Second Amended Complaint, making the Second Amended Complaint the operative complaint against Kubiak in this action." (Docket No. 85, p. 2.)

6. This Court has carefully reviewed Judge McCarthy's Report and Recommendation as well as the underlying papers and will accept Judge McCarthy's recommendation. Further, Plaintiff's second Motion for Default Judgment is denied as it is premature. Because the Clerk's prior entry of default addresses Defendant Kubiak's failure to respond to the initial complaint, Plaintiff must first secure an entry of default by the Clerk of the Court, addressing Defendant Kubiak's failure to respond to the Second Amended Complaint, before filing a Motion for Default Judgment based upon Defendant Kubiak's failure to respond to that document.

IT IS HEREBY ORDERED, that this Court accepts Judge McCarthy's Report and Recommendation (Docket No. 82) in its entirety, including the authorities cited and the reasons given therein.

FURTHER, that Plaintiff's Motion for Default Judgment (Docket No. 75) is DENIED.

FURTHER, that Plaintiff's second Motion for Default Judgment (Docket No. 83) is DENIED.

SO ORDERED.

Dated: March 29, 2009
Buffalo, New York

/s/William M. Skretny
WILLIAM M. SKRETNY
United States District Judge